No. 01-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

LARRY HOPE,

Petitioner,

—v.—

MARK PELZER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ALABAMA, THE ACLU OF FLORIDA, AND THE ACLU OF GEORGIA, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. §1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts materially similar to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. §1983.

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to protecting the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of that goal, the ACLU is frequently involved in litigation against government officials where issues of qualified immunity arise, both in this Court and in the lower state and federal courts. The ACLU of Alabama, the ACLU of Florida, and the ACLU of Georgia are statewide affiliates of the national ACLU located in the Eleventh Circuit. The qualified immunity standard applied by the Eleventh Circuit has directly affected each of their programs.

STATEMENT OF THE CASE

Petitioner, Larry Hope, an inmate assigned to a chain gang at the Limestone Correctional Facility in Alabama in 1995, was twice handcuffed to a "restraining bar," also known as a "hitching post," as punishment for disruptive behavior. *Hope v. Pelzer*, 240 F.3d 975, 977 (11th Cir. 2001). The hitching post is a horizontal bar "made of sturdy, non-flexible material" placed either 45 or 57 inches above the ground. *Austin v. Hopper*, 15 F.Supp.2d 1210, 1241 (M.D. Ala. 1995). "Hope was cuffed standing to a hitching post, with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." 240 F.3d at 978. According to Alabama Department of Corrections (DOC) policy, the hitching post is to be used to "eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct." *Hope*, 240 F.3d. at 978. It is by definition, then, a punitive device.

Hope filed suit against eight guards under the Eighth Amendment and 42 U.S.C. §1983. The federal District Court for the Middle District of Alabama dismissed Hope's action because of the guards' qualified immunity. 240 F.3d at 977. On appeal, the United States Court of Appeals for the Eleventh Circuit concluded that "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment." *Id.* at 980. In support of that conclusion, it noted that the Department of Justice advised prison authorities in 1994 that the hitching post was unconstitutional. *Id.* at 979. Even without that explicit advisory, the Eleventh Circuit held, "a factfinder [could] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," *id.* at 978, and that the hitching post's illegality "could be inferred from [prior] opinions." *Id.* at 981. Yet, notwithstanding its finding that the risk presented by the hitching post "was obvious" and that the unconstitutionality of defendants' actions "could be inferred" from prior opinions, the court of appeals ruled that the defendants were entitled to qualified immunity. "Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis." *Id.* Under the Eleventh Circuit's qualified immunity rules, "it is important to analyze the facts in these [prior] cases, and determine if they are 'materially

similar' to the facts in the case in front of us. Though analogous, the facts . . . are not 'materially similar' to Hope's situation." *Id.* Only "preexisting, obvious and mandatory" precedent, according to the Eleventh Circuit, satisfies this standard. *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit's "materially similar" test is inconsistent with this Court's qualified immunity jurisprudence. The touchstone of qualified immunity is "fair warning," as opposed to "factual identity." The Eleventh Circuit's "materially similar" test, in practice, demands precise factual identity, a rarity in constitutional litigation. Because the Eleventh Circuit's analysis creates an almost impregnable shield, there is little reason for officials to comply with constitutional standards. The Eleventh Circuit compounds its error by limiting its search for materially similar cases to the Supreme Court, the Eleventh Circuit and the supreme court of the state where the case arose. Contrary to the Eleventh Circuit's position, this Court has made it plain that a consensus of persuasive cases, even if they arise in other jurisdictions, can sufficiently establish the relevant law to defeat a claim of qualified immunity.

The use of prolonged physical restraints for punitive purposes was clearly unconstitutional in 1995. The last century witnessed the abandonment of stocks, stakes and pillories as arcane punitive devices that proved contrary to civilized society's evolving notions of decency. No state other than Alabama uses restraining bars or hitching posts to punish prisoners. The Department of Justice notified Alabama officials in 1994 that the hitching post was inconsistent with Eighth Amendment standards. Professional standards promulgated by the American Correctional Association (ACA) and the American Bar Association (ABA) caution against

the use of physical restraints as punishment. International law likewise prohibits their use for punitive purposes. No reasonable person could have believed in the mid-1990s that the Constitution tolerated summarily chaining inmates to hitching posts for hours on end for disciplinary purposes.

ARGUMENT

I. The Eleventh Circuit's Fact-Specific, "Materially Similar" Analysis Is Inconsistent With This Court's "Fair Warning" Standard

Executive officials performing discretionary functions are personally liable for violating "clearly established statutory or constitutional rights of which a reasonable person would have known." *Burns v. Reed*, 500 U.S. 478, 495 n.8 (1991)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Crawford-El v. Britton*, 523 U.S. 574, 587-88 (1998). This "qualified immunity" defense consists of two inquiries: the first is whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, __, 121 S.Ct. 2151, 2153 (2001). The second is whether the wrongdoer should have known that her conduct violated this constitutional standard given the facts presented. *See id.* at 2159 ("The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards"). Because "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made," *id.* at 2153, the ultimate question is whether "the officer's mistake as to what the law requires is reasonable." *Id.* at 2158.

As this Court's recent decision in *United States v. Lanier* explained, qualified immunity's "reasonable mistake" standard closely parallels vagueness principles grounded in the Fifth and Fourteenth Amendments' Due Process Clauses:

> [T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

520 U.S. 259, 270-71 (1997). The Court in *Lanier* thus rejected the view that public officials can be held liable for constitutional violations only if the contours of the right have been defined with particularity in a case with "fundamentally similar" facts. *Id.* at 269. While "prior decisions [can give] reasonable warning that the conduct then at issue violated constitutional rights," the "very action in question" need not have "previously been held unlawful." *Id.* at 268-71.

Just as criminal defendants are entitled to constructive notice that their conduct is prohibited, the qualified immunity defense insures that government officials receive "fair warning" before being held civilly liable. Absolute certainty is not necessary in either context, nor is unanimous judicial agreement on the verbal formulation of the controlling standard (whether criminal or constitutional): "Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard." *Saucier*, 121 S.Ct. at 2157.

Some rights, like an African-American's right to be free from invidious racial discrimination, have been so thor-

oughly litigated that their contours are clear in virtually every context imaginable. *See, e.g., Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997)("fit has been clearly established for many years that the Equal Protection Clause prohibits a State, when acting as an employer, from invidiously discriminating between individuals or groups based upon race"); *Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997).[2] Other rights may not have been as thoroughly litigated but are nonetheless clearly established based on a set of universal, unchallenged norms or understandings. The Seventh Circuit in *Brokaw v. Mercer County*, for example, concluded that

> a plaintiff need not always identify a closely analogous case; rather, he can establish a clearly established constitutional right by showing that the violation was *so obvious* that a reasonable person would have known of the unconstitutionality of the conduct at issue. Thus, binding precedent is not necessary to clearly establish a right. In fact, in the most extreme cases, *an analogous case might never arise because "the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worthwhile to litigate the issue."*

[2] *See* John C. Jeffries, Jr., "Disaggregating Constitutional Torts," 110 Yale L. J. 259, 277 (2000)("Someone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful. The defense is irrelevant because it is factually incredible"); Barbara E. Armacost, "Qualified Immunity: Ignorance Excused," 51 Vand. L. Rev. 583, 591 (1998)("Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously 'bad' behavior, obviating the need for qualified immunity in a case alleging such discrimination").

235 F.3d 1000, 1022 (7th Cir. 2000)(citations omitted and emphasis added). *See also May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000)("a perfect match with the facts of a prior case is not required to defeat a qualified immunity claim"). The court in *Brokaw* thus had little difficulty denying qualified immunity to officials who had improperly removed a child from his parents' home, notwithstanding the lack of binding decisions precisely on point. Qualified immunity is justified when rights are truly in doubt. When they are not, either because of clear precedent or common understanding, immunity should be denied.

A. The Eleventh Circuit Test For Qualified Immunity Treats Minor Factual Distinctions As More Important Than Enforcement Of Prevailing Constitutional Norms

By requiring a civil rights plaintiff to show the existence of a prior decision involving nearly identical facts in order to recover damages for a constitutional wrong, the Eleventh Circuit has effectively converted qualified immunity into absolute immunity for numerous government officials. When Justice Holmes spoke of "fair warning," he meant "language that the common world will understand." *Lanier*, 501 U.S. at 265 (citation omitted). He did not mean, and the law has never been construed to require, precise and unmistakable directions parsing every conceivable combination of facts.

Yet, that is the practical effect of the Eleventh Circuit's qualified immunity analysis: "only in exceptional cases will government actors have no shield against claims made against them . . . ." *Lassiter v. Alabama Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)(*en banc*).[3]

[3] *See also Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 n.3 (continued...)

Rather than search for common world understandings, the Eleventh Circuit demands legal precision and factual identity: "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Rowe v. Fort Lauderdale*, 2002 WL 86675 (11th Cir. Jan. 23, 2002)(quoting *Lassiter*, 28 F.3d at 1150). *Arguable* differences in *minor* facts are enough to defeat liability:

> [*M*]*inor variations* in some facts (the precedent lacks an *arguably significant* fact or contains an additional *arguably significant* fact not in the circumstances now facing the official) might be very important and, therefore, be able to make the circumstances facing an official materially different from the preexisting precedents, leaving the law applicable -- in the circumstances facing the official -- not clearly established when the defendant official acted.

Marsh v. Butler County, 268 F.3d 1014, 1032 (11th Cir. 2001)(emphasis added).

Just how differently this standard functions in practice from *Lanier*'s fair warning standard is demonstrated by the Eleventh Circuit's *en banc* reversal of Judge Kravitch's panel decision in *Jenkins v. Talladega City Bd. of Educ.*, 95 F.3d 1036 (11th Cir. 1996), *reversed*, 115 F.3d 821 (11th Cir. 1997)(*en banc*). In her panel opinion, Judge Kravitch

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[3] (...continued)
(11th Cir. 1997)(*en banc*)(refusing to reconsider Eleventh Circuit test in light of *Lanier*); *Gonzalez v. Lee County Housing Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998)("[t]his circuit has established stringent standards for a plaintiff seeking to overcome the affirmative defense of qualified immunity").

concluded that school officials who strip-searched two eight-year-old second graders were not entitled to qualified immunity. She explained that *Lassiter*'s "materially similar" standard "has been misconstrued as announcing a sweeping change." 95 F.3d at 1040. It "has been read by some to indicate that qualified immunity is due every official unless this court has addressed essentially identical facts in a previous case." *Id.* This, Judge Kravitch argued, was not the purpose of qualified immunity: "To treat each set of facts as unique and legally indeterminate would make qualified immunity absolute . . . ." *Id.* Judge Kravitch instead read the Supreme Court's qualified immunity precedent to allow for common sense: where "the official misconduct is more egregious than conduct of the same general type that has been deemed illegal in other cases," and where "application of the legal standard would necessarily lead reasonable officials in the defendant's situation to but one inevitable conclusion," immunity is lost. *Id.* at 1041. Even though no court had previously held school officials liable under identical facts, because the school officials "acted in blatant disregard of the Fourth Amendment," *id.* at 1048, they could not credibly claim immunity. In so ruling, Judge Kravitch joined a majority of circuits in recognizing that nothing is served by excusing blatant wrongdoing. *See, e.g.*, *Ayani v. Mottola*, 35 F.3d 680 (2d Cir. 1994); *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *Brokaw v. Mercer County*, 235 F.3d 1000.

Her opinion did not last for long, however. The *en banc* majority rejected Judge Kravitch's reasoning on the theory that "neither the Supreme Court nor any court in this circuit nor the Alabama courts . . . had ever actually applied the test established in [*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)] to define a reasonable (or unreasonable) search in the context of facts materially similar to those of this school search . . . . [S]chool officials cannot be required to con-

strue general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." 115 F.3d at 826-27. Whether the strip searches were more egregious than previously defined wrongs was not controlling nor even relevant. Nor was the fact that a reasonable official would "inevitably" conclude that strip searches under these facts were impermissible. Only an identical case, according to the *en banc* court, defeats qualified immunity. It is fair to surmise that had Judge Lanier extorted sexual favors from his victims in Florida, Georgia or Alabama, he would have been immune from §1983 liability.[4]

Like the Sixth Circuit test rejected in *Lanier*, the Eleventh Circuit's test for qualified immunity applies the "wrong gauge" to the qualified immunity question. Combing prior opinions for "arguable," "minor" differences serves no purpose other than to insulate blatant wrongdoing.[5]

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[4] In the civil analog to the criminal prosecution of Judge Lanier, the Sixth Circuit concluded he was not entitled to absolute judicial immunity. *See Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996). By contrast, the Eleventh Circuit would very likely extend Judge Lanier qualified immunity, since no similar case has ever been litigated in Alabama, Georgia or Florida. *See Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001)(Barkett, J., dissenting from denial of rehearing *en banc*)(discussed *infra* at IB).

[5] *Amici* recognize, of course, that qualified immunity is not available in injunction actions and cannot be raised by municipal defendants, even in damage actions. An injunction, however, is a forward-looking remedy that does not make the plaintiff whole. Moreover, under this Court's jurisprudence, a plaintiff seeking injunctive relief must allege an ongoing constitutional violation. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)(holding that victim of chokehold had no standing to seek injunctive relief because he could not demonstrate he would be choked again). Similarly, municipal liability demands proof of a local policy or custom, which will rarely exist when officials engage in patent wrongdoing. Be-

(continued...)

B. The Eleventh Circuit's "Materially Similar" Test, As Applied, Consistently Deviates From *Lanier*'s "Fair Warning" Standard

The Eleventh Circuit's "materially similar" standard seriously impairs victims' ability to redress constitutional wrongs. Even patent wrongs are insulated by minor factual distinctions. Judge Barkett's description of the factual record in *Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001)(Barkett, J., dissenting from denial of rehearing *en banc*), offers one illustration of a persistent problem:

> [The defendant] "ran a DA's office rife with gender-discrimination," . . . (1) berating his female employees with pejorative terms such as "hysterical female," "bitch," "blonde bombshell," "smurfette," and "bimbette," (2) photographing his female employees' buttocks, (3) throwing coins and other objects down his female employees' blouses, (4) telling a female employee to uncross and cross her legs again while he watched, (5) stating that the only thing women are good for is "making babies," (6) saying "women don't have the balls to be prosecutors," and (7) embarrassing his female employees with statements such as "you can't come in, Rita doesn't have her clothes on," . . . .

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[5] (...continued)
cause "[b]oth forms of relief require a concrete policy, [] more often than not [] the victim of constitutional wrongdoing [is] left without relief of any sort." Mark R. Brown, "The Failure of Fault Under §1983: Municipal Liability for State Law Enforcement," 84 Cornell L. Rev. 1503, 1537-38 (1999).

Despite these facts, the Eleventh Circuit ruled that "qualified immunity protects [the defendant] from civil liability because there [was] no pre-existing case which would have put him on notice . . . ." *Id.* In explaining the reason for her dissent, Judge Barkett observed that "a reasonable district attorney, or any other reasonable person, would have known that such outrageous conduct constituted sexual harassment." *Id.* at 1321. The majority disagreed. Relying on the Eleventh Circuit's expansive view of qualified immunity, it concluded that a reasonable person in the defendant's position would not have known that his behavior violated the plaintiff's constitutional rights, regardless of how outrageous that behavior may have been, "because the facts of this case are not sufficiently similar to any pre-existing case." *Id.* As Judge Barkett pointed out, by narrowing the inquiry to a search for similar facts rather than for a guiding legal principle, the Eleventh Circuit reached a result that is contrary to this Court's precedent, the analytic approach followed in every other circuit, and common sense. *Id.*[6]

[6] Less egregious facts have caused other circuits to deny qualified immunity in the context of sexual harassment. *See, e.g., Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 800 n.2 (6th Cir. 2000)("because the law regarding sexual harassment was established at the time Plaintiff brought her claim, Black was not entitled to the defense of qualified immunity"); *Johnson v. Martin*, 195 F.3d 1208, 1220 (10th Cir. 1999) ("[e]ven if the contours of a supervisor's responsibility are uncertain, complete inaction in the face of claimed harassment cannot be objectively reasonable conduct entitling a supervisor to qualified immunity"); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994)("A supervisor who has been apprised of unlawful harassment . . . should know that her failure to investigate and stop the harassment is itself unlawful"); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997)("Although the law construing the specific causes of action and remedies provided for by §§1983 and Title IX continues to evolve, it is evident that in 1994 Ms. Crawford had a clearly established right not to be discriminated against or harassed on the basis of her sex").

First Amendment rights have also suffered under the Eleventh Circuit's view of qualified immunity. For all intents and purposes, a public employee claiming workplace retaliation based on protected speech is barred from recovering damages in the Eleventh Circuit. *See Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)("Because *Pickering* requires a balancing of competing interests on a case-by-case basis . . . only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights").[7] Likewise, police have been given a virtual blank check to suppress speech using disorderly conduct and breach of the peace statutes. For example, in *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), a local attorney in Miami drove into a bank's parking lot, observed an apparently nonhandicapped woman walk to her car parked in a handicapped space, shouted to a nearby police officer: "[A]ren't you supposed to give them a ticket for parking in a handicapped spot?," *id.* at 1444, and "Miami police don't do shit," *id.*, and was arrested for disorderly conduct. Although acknowledging that both federal courts and Florida's Supreme Court had on several occasions "reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers," *see id.* at 1445, the Eleventh Circuit nonetheless ruled that the defendant police officers were entitled to qualified immunity. According to the Eleventh Circuit, "[t]he fact-intensive nature of the constitutional inquiry," coupled with a lack of "cases clearly establish[ing] that [the suspect's] actions did not constitute legally proscribed disorderly conduct," sufficiently blurred the First Amendment question to absolve the officers of liability. Prior rulings that the First Amendment protects angry and even profane language directed at police officers

[7] *Compare Myers v. Hasara*, 226 F.3d 821 (7th Cir. 2000)(refusing to award qualified immunity in case involving retaliation based on speech).

were not enough for the Eleventh Circuit.[8] Instead, it demanded a case with identical facts.

A similar fate has befallen the Fourth Amendment, which outside the excessive force context is now virtually unenforceable in the Eleventh Circuit. In *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), petition for *cert.* filed (Nov. 9, 2001)(No. 01-979), for example, students at West Clayton Elementary School in Clayton County, Georgia were strip searched following a classmate's report that he had lost an envelope containing $26.00. *Id.* at 1163. The Eleventh Circuit had "little trouble concluding" that the mass strip searches were unconstitutional; it was "readily apparent that the strip searches were highly intrusive . . . [and] clearly represent[ed] a 'serious intrusion upon the student's personal rights.'" *Id.* at 1168-69. Still, because it found no pre-existing, "factually defined" case precisely on point, it awarded the officials qualified immunity.[9]

Space constraints prevent *amici* from detailing an exhaustive list of cases awarding qualified immunity in the Eleventh Circuit. Suffice it to say that the Eleventh Circuit has, post-*Lanier*, found qualified immunity in literally every constitutional context imaginable. In addition to those cases discussed above, the Eleventh Circuit has upheld a qualified immunity defense to defeat racial discrimination claims,[10]

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[8] *Contrast Lewis v. New Orleans*, 415 U.S. 130 (1974)(striking down New Orleans ordinance making it unlawful for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police"). Every other circuit to consider this issue since *Lewis* has found that arrests based on profanity violate clearly established First Amendment standards. *See, e.g., Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162 (5th Cir. 1997)(no qualified immunity for arresting a motorist who told an off-duty policeman at a gas station to "move his damn truck"); *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997)(verbal exchange at airport; demand for officer's name and badge number; refusal to exit immediately after being ordered to do so); *MacKinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995)(writing with washable chalk on public sidewalk; failure to immediately stop); *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994)(arrest of referee at hotly-contested high school basketball game); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992)(arrest of person walking through downtown carrying a large cross and distributing leaflets); *Enlow v. Tishomingo County*, 962 F.2d 501, 509-10 (5th Cir. 1992)(on plaintiff's version, inquiry whether the sheriff had a search warrant or an arrest warrant; taking photographs of the officers); *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990)(calling police officer an "asshole"); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990)(obscene gestures and yelling profanities); *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987) (telling officer "I want my damn dog" and "did you shoot my dog?"); *Vela v. White*, 703 F.2d 147 (5th Cir. 1983)(walking down the street; agitated questioning about arrest).

[9] Courts have ruled for well over a decade that strip searches in schools, absent particularized suspicion, violate the Fourth Amendment. *See Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980)(holding that strip search of 13-year-old student violates Constitution and "any known principles of human decency"); *Bell v. Marseilles Elementary Sch.*, 160 F.Supp.2d 833 (N.D. Ill. 2001)(qualified immunity denied for mass strip search of students for missing money because case law *"clear for sixteen years"*) (emphasis added); *Konop v. Northwestern Sch. Dist.*, 26 F.Supp.2d 1189, 1205 (D.S.D. 1998)(qualified immunity denied for strip search of eighth grade girls where school "possessed no specific information that any particular student had stolen the money [that had come up missing from the girls locker room]"); *Oliver v. McClung*, 919 F.Supp. 1206, 1218 (N.D. Ind. 1995)(qualified immunity denied because "argument that it is not unreasonable to conduct a strip search of [an entire seventh grade class of] young school girls in an effort to recover the grand sum of four dollars and fifty cents is simply not convincing"); *Burnham v. West*, 681 F.Supp. 1160, 1165 (E.D.Va. 1987)(mass student search "conducted in an atmosphere devoid of individualized suspicion" unconstitutional).

[10] *See, e.g., Mencer v. Hammonds*, 134 F.3d 1066, 1070-71(11th Cir. 1998)(holding in interlocutory appeal that plaintiff's claim of racial discrimination was defeated by qualified immunity); *see also Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997)(applying qualified immunity to defeat §§1981 and 1983 claims based on racial

(continued...)

free speech claims,[11] charges of deadly force,[12] illegal searches[13] and unlawful arrests under the Fourth Amendment,[14] claims of abuse,[15] unsanitary prison conditions[16] and neglect[17] under the Eighth Amendment, and both procedural[18] and substantive[19] claims under the Fourteenth

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[10] (...continued)
discrimination). *See* Stephen B. Bright, "Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary," 14 Ga. St. L. Rev. 817, 841-42 (1998)("The [Eleventh Circuit] has also frequently found those accused of racial discrimination or other constitutional violations to be immune from suit").

[11] *See, e.g., Denno v. School Bd. of Volusia County*, 182 F.3d 780 (11th Cir. 1999)(officials immune for suspending student who brought Confederate flag to school).

[12] *See, e.g., Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001)(officer immune from liability for using deadly force and shooting into moving vehicle).

[13] *See, e.g., Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)(officers immune for strip searching detainee arrested for drunk driving).

[14] *See, e.g., Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998) (officers immune for arresting traveling minister for disorderly conduct).

[15] *See, e.g., Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994)(officials immune in connection with sexual abuse of youthful detainee by center employees).

[16] *See, e.g., Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998)(prison officials immune for poor prison conditions).

[17] *See, e.g., Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999)(failure to prevent suicide by prisoner).

[18] *See, e.g., Harbert Intern, Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998)(finding immunity from liability for Procedural Due Process and Fifth Amendment Takings violations).

[19] *See, e.g., Santamorena v. Georgia Military College*, 147 F.3d 1337 (continued...)

Amendment's Due Process Clause. The Eleventh Circuit, in sum, continues to immunize virtually every constitutional wrong imaginable under its "fact-specific" test.[20]

Gold, *Lewis*, *Thomas* and the present case illustrate the reality of constitutional litigation in the Eleventh Circuit: government officials regularly receive immunity regardless of the gravity of their wrongs and irrespective of the clarity of the rights they violate. Government officials are not expected by the Eleventh Circuit to deduce, extrapolate, or analogize, nor are they expected to employ constitutional common sense. *See* Brown, "The Failure of Fault Under §1983," *supra* note 5, at 1511 n.52 (noting that "the problem of too much immunity" may be "peculiar to the Eleventh Circuit"). Because the Eleventh Circuit's "materially similar" test has devolved into almost-absolute immunity, it strays far from the "fair warning" norm established by this Court and recognized by virtually every other circuit.

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[19] (...continued)
(11th Cir. 1998)(officials immune from liability for rape of female student on college campus).

[20] Only in rare instances are officials denied immunity. *Amici* have uncovered only a handful of Eleventh Circuit cases post-*Lanier* that refused qualified immunity. Most of these, moreover, involved frequently litigated, crystal-clear constitutional rights, like the prohibitions on invidious race- and gender-based discrimination. *See, e.g., Lambert v. Fulton County*, 253 F.3d 588 (11th Cir. 2000)(racial discrimination); *Alexander v. Fulton County*, 207 F.3d 1303 (11th Cir. 2000)(racial discrimination); *Braddy v. Florida Department of Law Enforcement*, 133 F.3d 797 (11th Cir. 1998)(sexual harassment). As observed above, the Eleventh Circuit sometimes awards immunity even in these contexts. An *en banc* decision of the Eleventh Circuit also recently denied qualified immunity in the context of prisoners' safety. *See Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001).

C. The Eleventh Circuit Errs By Refusing To Look To Persuasive Precedent

The Court has made plain that its qualified immunity inquiry focuses on whether the plaintiff can identify "controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seek[s] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). The Eleventh Circuit, however, continues to ignore persuasive precedent. Instead, it holds that clearly established law can only be located in published decisions of this Court, the Eleventh Circuit, and the supreme court of the state where the action arose. *See Hamilton v. Cannon*, 80 F.3d 1525, 1531-32 n.7 (11th Cir. 1996); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995)("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs' right to due process was clearly established"); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997)(*en banc*); *Marsh v. Butler County*, 268 F.3d at 1032 n.10 ("We do not understand *Wilson v. Layne*, 526 U.S. 603 (1999), to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly"). The result is a vanishingly small vision of fair warning.[21]

[21] Compounding the Eleventh Circuit's cramped vision of relevant precedent is its refusal to recognize that Florida's district courts of appeal are empowered to render binding decisions on a state-wide basis, *see Pardo v. State*, 596 So.2d 665, 666-67 (Fla.1992)("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts"), as well as its refusal to consider decisions of its federal district courts.

Virtually every other circuit to address the matter has concluded that a consensus of persuasive cases defeats qualified immunity. *See, e.g., Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001)(citing *Wilson*, 526 U.S. at 617); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C.Cir. 2001)("the court must determine whether the Supreme Court, the District of Columbia Circuit, and, *to the extent that there is a consensus, other circuits have spoken clearly on the lawfulness of the conduct at issue*")(emphasis added); *Jacobs v. Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (same); *Doe v. Delio*, 257 F.3d 309, 332 (3d Cir. 2001) (Nygaard, J., concurring and dissenting)(I believe that *a 'consensus of cases of persuasive authority'* had been established by 1995")(citing *Wilson*, 526 U.S. at 617)(emphasis added). As with its demand for precise, factually indistinguishable precedent, the Eleventh Circuit stands alone when it insists on binding support. No other circuit takes such a limited approach to qualified immunity.[22]

II. The Right To Be Free From Prolonged Physical Restraint That Risks Serious Harm Was Clearly Established Long Ago

The Eighth Amendment prohibits "cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991). This prohibition encompasses both "unnecessary and wanton infliction of pain," *see Rhodes v. Chapman*, 452 U.S. 337, 346 (1980), and prison conditions that deny inmates the "mini-

[22] Several other circuits reached this conclusion before this Court's decision in *Wilson*. *See, e.g., Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988); *Vaughn v. Ruoff*, 253 F.3d 1124, 1130 (8th Cir. 2001); *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985).

mal civilized measures of life's necessities." *Id.* at 347. Because the Eighth Amendment applies to prison authorities as well as legislative bodies and judges, "deprivations that were not specifically part of the sentence, but were suffered during imprisonment" are subject to its terms. *See Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Where "the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300 (emphasis in original). Where punitive intent is clear, the question is an objective one: whether the punishment is compatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

Handcuffs, shackles and irons are not *per se* unconstitutional under the Eighth Amendment. *See Jackson v. Cain*, 864 F.2d 1235, 1243 (5th Cir. 1989)(holding that chains may be used under certain circumstances). Restraints are permissible, for example, when linked to a "legitimate penological interest," *Turner v. Safley*, 482 U.S. 78, 89-90 (1986), such as preventing escape when a prisoner is taken outside the prison, *see Fulford v. King*, 692 F.2d 11 (5th Cir. 1982)(holding that handcuffs may be used on prisoners outside the prison to prevent escape), preventing suicide or violence, *see Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995), or limiting inmate access to unauthorized areas within the prison. *Knox v. McGinnis*, 998 F.2d 1405, 1412 (7th Cir. 1993).

Prolonged physical restraint runs afoul of the Eighth Amendment in two instances: (1) "where movement is denied [,] . . . [and] the health of the individual is threatened," *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), and (2) where the restraint "could [not] plausibly have been thought necessary" to achieve some legitimate penological interest, such as protecting the inmate, preventing escape, or

"restoring official control over a tumultuous cellblock." *See Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Youngberg v. Romeo*, 457 U.S. 307 (1981)(holding that freedom of bodily movement is a fundamental right); *Wells v. Franzen*, 777 F.2d 1258, 1262 (7th Cir. 1995)("Due process requires that the nature and duration of the physical restraint bear some reasonable relation to the purpose for which it is prescribed"). Prolonged physical restraint for punishment's own sake necessarily constitutes cruel and unusual punishment -- with or without serious physical injury.

The restraint employed in the present case seriously threatened the health of the inmate. As observed by the court below, Hope's restraint posed a substantial risk of harm that was disregarded by the staff. *Hope*, 240 F.3d at 978. Hope was handcuffed to the post "in the hot sun for seven hours with no shirt," little water and no restroom breaks. *See id.* at 978-79 (citing *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), and *Wilson v. Seiter*, 501 U.S. at 300). "At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." 240 F.3d at 978. His restraint, moreover, was unrelated to any legitimate penological interest. In *Whitley*, 475 U.S. at 322, this Court warned that "actions taken in bad faith and for no legitimate purpose" by prison officials violate the Eighth Amendment. Shooting an inmate in order to punish him certainly violates this standard. *Id.* Likewise, because chaining an inmate to a post or stake for a prolonged period of time serves no legitimate nonpunitive purpose, it too runs afoul of the Eighth Amendment. As recognized below, punishment for punishment's sake is not a legitimate justification for abusive force and prolonged restraint. *Hope*, 240 F.3d at 979.

For more than a century, courts have routinely condemned physical restraints such as stocks, stakes and pillories. In *Weems v. United States*, 217 U.S. 349, 376-78

(1910), this Court expressed doubt over whether the pillory and whipping post were acceptable punishments: "it may be well doubted," the Court opined, that either proved consistent with a "progressive" and "enlightened" approach to criminal corrections. By 1981, it was clear that "the public pillory [had been] long abandoned as a barbaric perversion of decent justice."[23] *Chandler v. Florida*, 449 U.S. 560, 580-81 (1981). Indeed, as early as 1840 one constitutional commentator concluded that "[t]he prohibition of cruel and unusual punishments . . . would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Baynard, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840)(quoted in *Harmelin*, 501 U.S. at 981).

Because "[t]he pillory is almost identical to the stocks, which is identical to the restraining bar," *Austin v. Hopper*, 15 F.Supp.2d at 1259 (quoting transcript of hearing before magistrate judge), and since, "[i]f anything, the pillory, as it was designed, was probably more comfortable because in most cases the prisoner sat on the ground and had his feet and his hands put through a stock," *id.*, the hitching post's comparison to the pillory is inevitable. The Eleventh Circuit's predecessor, the Fifth Circuit, had little difficulty with this analogy in *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974), where it found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise

[23] The Court cited *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893), where the Indiana high court stated that punishments "such as that inflicted at the whipping post, in the pillory, burning at the stake, [and] breaking on the wheel" were certainly cruel and unusual. 217 U.S. at 376.

maintain awkward positions for prolonged periods" runs afoul of the Eighth Amendment. In 1994, the Department of Justice "advised the DOC that the use of the hitching post constituted improper corporal punishment and was not an acceptable use of restraints." *Hope*, 240 F.2d at 978-79. Judge Thompson in *Austin v. Hopper*, 15 F.Supp.2d at 1259, citing *Gates*, observed that "for over 20 years, institutional practices that impose pain on inmates in ways similar to the hitching post have been deemed to 'offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.'"

The fact that only Alabama authorizes physical restraint in this fashion, *Austin*, 15 F.Supp.2d at 1259, demonstrates that the practice is "not regularly or customarily employed." *Harmelin*, 501 U.S. at 976. Professional standards promulgated by the American Correctional Association (ACA) and the American Bar Association (ABA), moreover, absolutely prohibit the use of prolonged restraint as punishment. *See* AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATIONS FOR CORRECTIONS STAFF, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 60 (3d ed. 1990) ("instruments of restraint, such as handcuffs, irons, and straight jackets, *are never applied as punishment* . . . .")(emphasis added);[24] IV AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 23-121 (2d ed. 1983)("Personal restraints like handcuffs, irons, and straitjackets are to be used only if necessary to prevent individual prisoners from

[24] According to the ACA, "instruments of restraint should be used only as a precaution against escape during transfer, for medical reasons, by direction of the medical officer, or to prevent self-injury to others, or property damage." STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, *supra*.

escaping during transfers or injuring themselves or others")(cited in *Austin*, 15 F.Supp.2d at 1259 nn.221 & 222). It was thus abundantly clear in 1995 that Alabama's use of hitching posts as corporal punishment was foreign to the American penological ideal. Indeed, Alabama's practice is aberrant even when judged by universal standards, such as those promulgated by the United Nations. *See* UNITED NATIONS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 6-7 (1984)("Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment")(cited in *Austin*, 15 F.Supp.2d at 1259 n.222). By 1995, no reasonable official could have understood constitutional precedent to tolerate summarily[25] chaining an inmate to a hitching post for hours on end. The practice was clearly unconstitutional.

[25] Although apparently not raised below, summary use of the hitching post likely violates procedural due process, since it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit, awarding qualified immunity, should be reversed.

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